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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6638

ROGER DALLAS ROWBOTHAM,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

BRIEF OPPOSING CERTIORARI

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I N D E X

Subject Index

	Page
Statement of the Case	1
Reasons for not Granting Writ	1
I. OKLAHOMA'S SCHEME OF MANDATORY CAPTIAL PUNISHMENT DOES NOT PERMIT INFLICTION OF THE DEATH PENALTY CONTRA TO FURMAN V. GEORGIA, 408 U.S. 238 (1972), NOR IS THE DEATH SENTENCE IMPOSED UPON PETITIONER OTHERWISE CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.	2
Prosecutorial Discretion	2
Jury Discretion	3
Executive Clemency	5
II. EXCLUSION OF VENIREMEN FOR JUST CAUSE IS NOT REPUGNANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.	5
III. A CONFESSION NOT FLOWING FROM INTERROGATION OR PRESSURE BY POLICE, BUT FREELY VOLUNTEERED BY PETITIONER AFTER A CONFERENCE WITH CLOSE RELATIVES, POSES NO ISSUE UNDER MIRANDA V. ARIZONA, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); MIRANDA REQUIREMENTS WERE MET.	7
IV. NO FIFTH AMENDMENT ISSUE EXISTS WHERE, AS HERE, PROSECUTOR'S STATEMENT WAS NOT A COMMENT ON PETITIONER'S FAILURE TO TESTIFY.	10
Conclusion	11

Cases Cited

Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974)	4
Coyote v. United States, 380 F.2d 305 (10th Cir. 1967)	9
Crampton v. Ohio, 402 U.S. 183 at 219, 91 S.Ct. 1454, 28 L.Ed.2d 711 at 733 (1971)	11
Furman v. Georgia, 408 U.S. 238 (1972)	1, 3, 5, 6
Green v. Oklahoma, No. 75-6451, page 1b	4
Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)	11
Jurek v. State, Tex.Crim.App., 522 S.W.2d 934 (1975)	4

Page

Massimo v. United States, 463 F.2d 1171 (2nd Cir. 1971), cert. denied, 409 U.S. 117, 93 S.Ct. 920, 34 L.Ed.2d 700 ---------- 9

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) ---------- 7, 9

Provo v. State, Okl. Cr., ____ P.2d ____, Appellate No. F-75-301, issued April 20, 1976 --------- 4

Rowbotham v. State, Okl. Cr., 542 P.2d 610 (1975) ----- 1

Shick v. Reed, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974) ---------- 5

State v. Dickerson, Del. Sup., 298 A.2d 761, 769-770 (1972) ---------- 4

State v. Dixon, Fla., 283 So.2d 1 (1973) ---------- 4

State v. Selman, La., 300 So.2d 467 (1974) ---------- 4

State v. Sheppard, Del.Sup., 331 A.2d 142 (1975) ------ 4

State ex rel. Young v. Warren, Okl. Cr., 536 P.2d 965 (1975) ---------- 3

United States v. Cassell, 452 F.2d 533 (7th Cir. 1971) ---------- 9

United States v. Garcia, 431 F.2d 134 (9th Cir. 1970)-- 9

United States v. Lacy, 446 F.2d 511 (5th Cir. 1971) --- 9

Williams and Justus v. State, Okl. Cr., 542 P.2d 554 (1975) ---------- 4, 5, 6

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) ---------- 5

Woods v. State, Okl. Cr., 440 P.2d 994, cert denied, 393 U.S. 953, 89 S.Ct. 378, 21 L.Ed.2d 364 ---------- 11

Wright v. State of North Carolina, 483 F.2d 405 (4th Cir. 1973), cert. denied, 415 U.S. 936, 94 S.Ct. 1452, 39 L.Ed.2d 494 ---------- 9, 10

Statutes Cited

21 O.S. Supp. 1974, §701.3 ---------- 3, 7

22 O.S. 1971, §264 ---------- 3

Articles of Constitution

Article VI, §10, Oklahoma Constitution ---------- 5

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	)	
Respondent.	)	

BRIEF OPPOSING CERTIORARI

STATEMENT OF THE CASE

Roger Dallas Rowbotham, hereinafter referred to as petitioner, was convicted of Murder in the First Degree. His sentence of death was affirmed on appeal to the Oklahoma Court of Criminal Appeals, reported below as Rowbotham v. State, Okl. Cr., 542 P.2d 610 (1975).

REASONS FOR NOT GRANTING WRIT

Oklahoma's mandatory scheme of capital punishment does not permit infliction of the death penalty contra to Furman v. Georgia, 408 U.S. 238 (1972), nor is death sentence imposed otherwise cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendment of the United States Constitution.

Exclusion of veniremen for just cause is not repugnant to the Sixth and Fourteenth Amendments to the United States Constitution.

A confession not flowing from interrogation or pressure by police, but freely volunteered by petitioner after a conference with close relatives poses no issue under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694

No Fifth Amendment issue exists where, as here, prosecutor's statement was not a comment on petitioner's failure to testify.

I.

OKLAHOMA'S SCHEME OF MANDATORY CAPITAL PUNISHMENT DOES NOT PERMIT INFLICTION OF THE DEATH PENALTY CONTRA TO FURMAN V. GEORGIA, 408 U.S. 238 (1972), NOR IS THE DEATH SENTENCE IMPOSED UPON PETITIONER OTHERWISE CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Generally, petitioner cites a number of cases antedating current capital punishment statutes with the inference that the former affects the latter. However, Oklahoma's procedure was significantly changed by the enactment of current capital punishment legislation and respondent submits that no State in the Union has exceeded Oklahoma in curbing arbitrary discretion.

PROSECUTORIAL DISCRETION

To say that the prosecutor has no discretion in determining the charge to be filed would be inaccurate, because admittedly he does. No system has yet been devised, if indeed such a system is possible, to ensure that the prosecutor uses correct judgment in the selection of the charge to be filed. However, this is not to say that the prosecutor has unlimited discretion. Petitioner recognizes that once a charge is filed, any action relating to the disposition thereof requires court approval.[1] Oklahoma procedure also requires the examining magistrate at a preliminary hearing to direct the accused to be held for trial on a

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1. Petitioner's brief, Appendix B, page 22.

charge which the evidence reflects, not necessarily the crime charged.[2]

Further, in response to Furman, the Oklahoma Court of Criminal Appeals has held that once the accused has been arraigned for a capital offense, the State cannot simply enter into a plea bargain agreement. The State must establish by competent evidence that the accused committed the lesser offense and is not guilty of Murder in the First Degree as a predicate for the District Court to approve a reduction of the charge. State ex rel. Young v. Warren, Okl. Cr., 536 P.2d 965 (1975).

JURY DISCRETION

Oklahoma requires assessment of the death penalty upon the conviction of Murder in the First Degree, 21 O.S. Supp. 1974, §701.3. Petitioner stresses that Oklahoma procedure also provides for instructing the jury regarding a lesser included offense,[3] but only where warranted by the evidence. Surely petitioner does not suggest such instruction should not be given irrespective of the evidence, for such procedure most certainly would be fundamentally unfair to any

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2. 22 O.S. 1971, §264, provides:

> "Defendant held to answer.
>
> "If, however, it appears from the examination that any public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must in like manner indorse on the complaint an order signed by him to the following effect:
>
> "It appearing to me that the offense named in the within complaint mentioned (or any other offenses, according to the fact, stating generally nature thereof), has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer the same."

3. Petitioner's brief, Appendix B, pages 29-36.

accused. Petitioner's argument in this regard inherently calls for condemnation of jury determination in capital cases and necessarily presents a separate and distinct approach regarding the constitutionality of the death penalty itself. If this Court should adopt petitioner's concept, then our present system of criminal jurisprudence must necessarily be dismantled, for the traditional role of a juror to judge the credibility of witnesses, weigh the evidence and be a trier of fact, is inextricably woven into our system of justice.

A lesser included instruction was not given in the instant case because it was not warranted by the evidence. Nor was such instruction given in, e.g., Williams and Justus v. State, Okl. Cr., 542 P.2d 554 (1975). In this connection, petitioner's contention presents a mild irony. Williams, Justus and petitioner are white, while William Provo, a black,[4] will be given a new trial because the trial court committed fundamental error by failing to instruct the jury on Manslaughter in the First Degree under the evidence adduced.[5]

Delaware is the only jurisdiction respondent notes to seemingly accept the view that prohibitive discretion remains where the judge or jury trying the case may find the accused guilty of a lesser included offense, State v. Sheppard, Del.Sup., 331 A.2d 142 (1975) citing dictum from State v. Dickerson, Del. Sup., 298 A.2d 761, 769-770 (1972). Other jurisdictions do not accept this view, e.g., State v. Selman, La., 300 So.2d 467 (1974); State v. Dixon, Fla., 283 So.2d 1 (1973); Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974); Jurek v. State, Tex.Crim.App., 522 S.W.2d 934 (1975).

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4. Petitioner's brief, Green v. Oklahoma, No. 75-6451, page 1b.

5. Provo v. State, Okl. Cr., ___ P.2d ___, appellate No. F-75-301, issued April 20, 1976.

EXECUTIVE CLEMENCY

Oklahoma has held the possibility of executive clemency under Article VI, §10 of the Oklahoma Constitution not to be repugnant to either the State or Federal Constitutions, Williams and Justus v. State, supra.

In the post-Furman case of Shick v. Reed, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974), this Court recognized that the very essence of the pardoning power is to treat each case individually and that individual acts of clemency inherently call for discriminating choices, because no two cases are the same.

II.

EXCLUSION OF VENIREMEN FOR JUST CAUSE IS NOT REPUGNANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent submits that petitioner misconceived the rationale of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), wherein the viewpoint of five Justices expressed through Mr. Justice Stewart, was stated in pertinent part at 391 U.S. 518, 20 L.Ed.2d 782:

> "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, 'free to select or reject as it sees fit,' a jury that must choose between life imprisonment and capital punishment can do little more . . . and must do nothing less . . . than express the conscience of the community on the ultimate question of life or death." (Emphasis added)

The question raised can be phrased quite succinctly:

> In a jurisdiction where the penalty of death is mandatory, is it constitutional error to exclude a juror whose reservations regarding the mandatory death penalty are such that he either cannot vote to convict or is unresolved as to whether he could vote to convict, even though convinced beyond a reasonable doubt that the accused is guilty of the capital

If this be error, then any proposed scheme providing for mandatory death must ultimately fall, whether the punishment be assessed by court or jury, simply because common sense dictates that the public from which the jury is impaneled could not be presumed to be ignorant of the penalty which must follow a determination of guilt. The result of accepting unqualified veniremen seems obvious. In the final analysis, petitioner's argument regarding the exclusion of unqualified veniremen is nothing less than an attack upon the mandatory death penalty itself.

The "conscience of the community" is no longer left to jury decision in capital cases, but is reflected in statutory provisions enacted by elected representatives of the people. Assuming arguendo that unqualified veniremen were not excused for cause, how could the trial court properly administer the oath requiring them to truly try the case and instruct them as to the law that must be followed, the court having been forewarned that they do not know whether they could follow the law? Respondent knows of no case holding that a jury may properly ignore or reject an instruction of the trial court. Certainly, the trial court must not accept a juror who doesn't know whether he can follow the law. Otherwise, the administration of the oath would be frivolous, thereby creating a chaotic system of jurisprudence which would be a mockery based upon personal whims of individuals. See, e.g., dialogue and response of Mrs. Angel in Williams and Justus v. State, Okl. Cr., 542 P.2d 554, at page 589.

Further, although petitioner states that under Oklahoma's post-Furman procedure, the jury acts simultaneously to determine both guilt and punishment,[6] the jury is not authorized to determine punishment. The jury must affirmatively state in their verdict that the defendant shall suffer death, that

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6. Petitioner's brief, page 16

penalty having been predetermined by law under 21 O.S. Supp. 1974, §701.3.[7]

III.

A CONFESSION NOT FLOWING FROM INTERROGATION OR PRESSURE BY POLICE, BUT FREELY VOLUNTEERED BY PETITIONER AFTER A CONFERENCE WITH CLOSE RELATIVES, POSES NO ISSUE UNDER MIRANDA V. ARIZONA, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); MIRANDA REQUIREMENTS WERE MET.

First, petitioner affirmatively states in his brief that the language used to advise him of his rights was the same in each instance. He thereafter quotes the language contained in the allegedly defective waiver.[8] He further claims there can be no question that the statements relied upon at trial were the product of custodial interrogation within the meaning of Miranda.[9] Respondent disagrees with this statement of the record.

When petitioner was arrested at 12:40 P.M. on February 16, 1974, he was immediately advised of his constitutional rights and stated that he understood them. The enumeration of the rights given petitioner at this time do not appear in the record because of defense counsel's objection to the officer's testimony relating thereto:

> "A. I, myself personally immediately advised Mr. Rowbotham that he was under arrest for the murder of Beverly Meeker, and that he had the following rights as prescribed by the Supreme Court of the United States in accordance with the Miranda decision.
>
> "Q. Did you advise him of those rights?

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7. Petitioner's brief, page 4.

8. Petitioner's brief, page 22.

9. Petitioner's brief, page 25.

"A. I certainly did, I advised him, uh, Mr. Rowbotham, that he had the right to remain silent and . . .

"(Interruption by counsel.)

"MR. DOUTHITT: If the Court please, I object to what he advised him, he stated he advised him of his rights.

"THE COURT: Okay, sustained.

"MR. HOPPER: Q. After you advised Mr. Rowbotham of his rights, did he indicate that he understood those rights?

"A. I asked Mr. Rowbotham, if he understood what I had related to him, and he stated that he did, he understood his rights at that time." (Tr. 150, 151)

His rights were read to him from a "Miranda card" carried by the officer (Tr. 105). Less than two hours later, the petitioner signed the allegedly defective waiver, stating he understood his rights (Tr. 110). The officer advised petitioner that his automobile had been seen in the area where the body of the deceased woman had been discovered (Tr. 153). Petitioner acknowledged that he had been there and that his automobile had been parked in the area. At this point, petitioner requested to talk with his father and his wife before further talking with the officers. His request was honored and petitioner was permitted to freely visit with his father and his wife (Tr. P.H. 40). After conversing with relatives for 30 minutes, petitioner called the officer back into the office and advised them that he had taken the life of the victim. He explained to the officers what had occurred and consented to a request to return to the crime scene (Tr. 153-156).

The only enumerated rights reflected by the record are those contained in the allegedly defective waiver. Whether the initial advisement of constitutional rights from the "Miranda card" was a correct enumeration thereof is not shown, but apparently, petitioner's counsel was satisfied at the time of trial, as evidenced by his statements during that time.

Further, respondent submits Miranda contemplates questioning initiated by law enforcement officers[10] and the fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.[11]

There was no questioning initiated by law enforcement officers within the scope of Miranda. To confess was not the product of an interrogation, either direct or subtle, but one volunteered after a conference with close relatives. But assuming arguendo, that the rule pronounced in Miranda is applicable, respondent submits the instant case comports with the directives therein. See Wright v. State of North Carolina, 483 F.2d 405 (4th Cir. 1973), cert. denied, 415 U.S. 936, 94 S.Ct. 1452, 39 L.Ed.2d 494 and United States v. Lacy, 446 F.2d 511 (5th Cir. 1971).

In Massimo v. United States, 463 F.2d 1171 (2nd Cir. 1971), cert. denied, 409 U.S. 117, 93 S.Ct. 920, 34 L.Ed.2d 700, the Court adopted the view of Lacy and specifically rejected conclusions reached in United States v. Cassell, 452 F.2d 533 (7th Cir. 1971) and United States v. Garcia, 431 F.2d 134 (9th Cir. 1970). In Coyote v. United States, 380 F.2d 305 (10th Cir. 1967), the words of the late Judge Murrah are significant:

> "Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act."

An examination of the allegedly defective statement of constitutional rights reveals that petitioner was clearly informed of all his constitutional rights under Miranda. The statement

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10. 384 U.S. at 444, 86 S.Ct. at 1612.

11. 384 U.S. at 478, 86 S.Ct. at 1630.

of fact by the officer that, "We cannot ourselves furnish you a lawyer, but one will be appointed for you, if you wish, when you go to court," does not in any manner contradict, nor dilute the explanation of rights given by the officer. Petitioner was clearly advised that he had a right to remain silent and to have the advice and presence of a lawyer before and during any questioning, even if he could not afford to hire one. Further, if he wished to answer questions without a lawyer present, he had a right to stop answering questions at any time. Petitioner clearly and freely had the option to remain silent and consult with a lawyer before answering any questions. Instead, he chose to volunteer his statement.

However, respondent concedes the law is contradictory among the circuits and the state courts on this question as pointed out by Justice Douglas in his dissent from denial of certiorari in Wright v. North Carolina, supra, and which was recognized by the Oklahoma Court of Criminal Appeals in the instant case.[12]

IV.

NO FIFTH AMENDMENT ISSUE EXISTS WHERE, AS HERE, PROSECUTOR'S STATEMENT WAS NOT A COMMENT ON PETITIONER'S FAILURE TO TESTIFY.

Essentially, petitioner contends the prosecutor's statement during closing argument, "The evidence presented by the State has gone uncontradicted," violates his Fifth Amendment right because it indirectly constitutes a comment on his failure to testify. In support thereof, he contends there is nothing in the record to indicate that pertinent prosecution evidence could have been rebutted in any manner

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12. 542 P.2d at 619, N. 3.

other than by testimony by petitioner. Respondent does not agree.

An analysis of the leading case, Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), reflects nothing approaching the complaint made here. There, the prosecutor directly commented on the accused's failure to testify. The trial court also instructed, in effect, that the failure of the accused to testify in rebuttal may be weighed by the jury against the accused.

Here, as fairly interpreted, the comment was an assertion that there had been no evidence controverting that presented by the State. It was a comment on the fact that testimony of witnesses for the State had not been contradicted. See, e.g., Woods v. State, Okl. Cr., 440 P.2d 994, cert. denied, 393 U.S. 953, 89 S.Ct. 378, 21 L.Ed.2d 364.

An accused can put before the jury a great deal of background evidence with at best a tenuous connection to the issue of guilt.[13] Respondent submits that petitioner seeks an unwarranted extension of this Court's holding in Griffin.

CONCLUSION

Therefore, premises considered, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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13 Crampton v. Ohio, 402 U.S. 183 at 219, 91 S.Ct. 1454

CERTIFICATE OF MAILING

This is to certify that I mailed a copy of the instrument to which this certification is attached to the following named counsel of record, this 21st day of May, 1976:

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